Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 80-627

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

A JUVENILE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT IN OPPOSITION

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I.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the decision of the Supreme Judicial Court of Massachusetts dismissing petitioner's request for relief?

2. Whether Petitioner's situation presents a double jeopardy issue under the principles of Burks v. United States, 437 U.S. 1 (1978)?

PARTIES

The parties to this case are an unnamed juvenile, the petitioner, and the Commonwealth of Massachusetts, the respondent.

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The Commonwealth of Massachusetts respectfully asks that the petition for a writ of certiorari be denied.

OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1980) 1939, 409 N.E.2d 755 (August 22, 1980). See Petition for Certiorari Appendix 1a-6a.

JURISDICTION

The Commonwealth contests the petitioner's claim of jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

Mass. General Laws, c. 119, § 56, as amended through St. 1977, c. 431, § 2, Massachustts' de novo appeals statute, applicable to juvenile criminal defendants, which was in effect during this case is set out in the Appendix, at A-1. Massachusetts reorganized its district court trial system in 1979. The present de novo appeals statute is set out in the Appendix at A-2.

STATEMENT OF THE CASE

Petitioner, a juvenile, was arraigned on two complaints alleging him to be a delinquent child: receiving stolen goods in violation of Mass. G.L. c. 266, § 60 and possession of burglarous instruments in violation of Mass. G.L. c. 266, § 49. The

trial was held on December 19, 1978.[1/]

1/ Petitioner was tried under a two tier district court system, which has since been reorganized. Under the procedure in effect at the time of the petitioner's trial, a juvenile defendant would first be tried at a bench trial. M.G.L. c. 119, § 54 as amended through St. 1973, c. 1073, § 7. A juvenile found delinquent at a bench trial, could claim a de novo jury trial in the Juvenile Court, M.G.L. c. 119, § 56, as amended through St. 1977, c. 431, § 2. See Appendix at A-1. A juvenile was not provided an opportunity to have a first instance jury trial. This procedure was upheld by the Court in Ludwig v. Massachusetts, 427 U.S. 618 (1976), as applied to an adult defendant.

Requiring a defendant to stand trial in the first tier, before permiting the defendant a jury trial was strongly criticized by Justice Stevens. Ludwig, 427 U.S. at 634 (Stevens, J., dissenting). This problem was resolved in the Massachusetts Court Reorganization of 1978. Presently, a defendant in district court is tried in a jury session, unless the defendant explicitly waives his right to a first instance jury trial. If the defendant is dissatisfied with the first tier bench trial he may claim his right to a second tier trial in the jury session. The second tier jury session is

Petitioner, with his mother and counsel, together with the arresting police officer and three witnesses for the Commonwealth appeared before the juvenile session of the West Roxbury District Court. The Commonwealth was not represented by counsel. The trial was held in the judge's chambers and was not recorded.

After all the witnesses were sworn, the police officer testified that he responded to a radio call, went to a certain address and arrested the petitioner. He found part of a coat hanger and a screwdriver on the

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Footnote No. 1 continued.

de novo; the sentence imposed at the bench trial is vacated. M.G.L. c. 119, § 55A inserted by St. 1978, c. 478, § 56 effective January 1, 1979. See Appendix at A-1,2.

petitioner. When the officer began to testify to statements made to him by the witnesses, defense counsel objected. The judge overruled the objection and once more the officer testified as to statements made to him by the witness. Again, defense counsel objected. After determining that the witnesses, whose statements formed the basis of the policeman's testimony, were present in chambers, the judge denied the objection and directed the officer to continue.

The police officers' testimony, based on the statements of the witnesses, was the only evidence presented on the charge of receiving stolen goods. What the evidence was on the charge of possession of burglarous instruments is not disclosed by the record.

At the close of the officer's testimony, the judge asked the Commonwealth's witnesses, jointly, if they could corroborate the officer's testimony - they replied affirmatively. The juvenile offered no evidence. The judge found the juvenile a delinquent child on both counts.

The juvenile claimed a trial de novo. After arraignment in the Appellate Division of the Boston Juvenile Court, his counsel moved to dismiss the complaint. Counsel contended that double jeopardy principles, as enunciated by this Court in Burks v. United States, 437 U.S. 1 (1978), barred a second trial because there was insufficient competent evidence to sustain a finding of delinquency. The second tier judge denied defendant's motion to dismiss and remanded

the cases to District Court for another hearing.[2/]

Defense counsel then sought relief from this order before a single justice of the Supreme Judicial Court under the Court's general superintendence powers. M.G.L. c. 211, § 3. The single justice stayed the

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2/ The second tier judge did not articulate the reasons for denying defendant's motion to dismiss or for remanding the case to the first tier juvenile session. Defense counsel argued, on the motion, that the defendant had been denied both his right to confrontation of the witnesses against him, and his right of cross-examination, and also that the evidence at the first tier bench trial was insufficient. The prosecutor suggested that the trial judge may have been confused concerning the nature of the proceedings - the trial judge treated the proceedings as a plea to sufficient facts rather than a trial. It is also entirely possible that the second tier judge considered the improper admission of hearsay testimony to be a trial error. United States v. Scott, 437 U.S. 82 (1978).

lower court's proceedings pending the resolution of the questions which he reserved and reported to the full bench.

In his reservation and report, the single justice considered the following to be the principle question raised:

> Whether the juvenile's constitutional right not to be twice put in jeopardy for the same offense would be violated if he were required to stand trial de novo in the Appellate Division of the Boston Juvenile Court on two charges as to which the admissible, nonhearsay evidence presented by the Commonwealth thereon in the prior hearing in the juvenile session of the district court was not sufficient to support a finding of guilty beyond a reasonable doubt. See Burks v. United States, 437 U.S. 1 (1978)."

The Supreme Judicial Court answered the question in the negative, stating that, "a double jeopardy claim based on the

principles of Burks v. United States has no validity in our former two tier trial system." A Juvenile v. Commonwealth, Mass. Adv. Sh. (1980) 1939, 1943, 409 N.E.2d 755, 757. The Court then dismissed the petition.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THIS COURT LACKS JURISDICTION

A. There is no final judgment from the Supreme Judicial Court of Massachusetts

The jurisdiction of the Supreme Court, on review of state decisions, extends only to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257 In the petitioner's case there is no final judgment rendered by the Supreme Judicial Court of Massachusetts. Not only is there no final judgment, but there is no judgment

whatsoever. The petitioner was found to be a delinquent child in a first tier bench trial.[3/]. He immediately noted his claim of appeal for a trial de novo. Under the two tier district court trial system, the claim of appeal for a trial de novo vacated the sentence imposed at the bench trial. M.G.L. c. 278, § 18 (1972). Enbinder v. Commonwealth, 368 Mass. 214, 217, 330 N.E.2d 846, cert. denied, 423 U.S. 1024 (1975), Commonwealth v. Costarelli, 421 U.S. 193, 194 (1975). Under Massachusetts District Court procedure there is no sentence outstanding against the petitioner. Since there is no

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3/ See note 1 describing the present and former two tier district court trial system in Massachusetts.

sentence, there is no final judgment.[4/]

B. The exceptions to the final judgment rule do not apply

Since there is no explicit judgment on the record, the Court's jurisdiction must be based on an exception to the final judgment rule. This Court in Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) established four analytic categories where Supreme Court review would be possible without a traditional final judgment. In addition this Court in Harris v. Washington, 404 U.S. 55 (1971) (per

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4/ Parr v. United States, 351 U.S. 513, 518 (1956); Berman v. United States, 302 U.S. 211, 212-213 (1937) ("final judgment in a criminal case means sentence. The sentence is the judgment.").

curiam); Abney v. United States, 431 U.S. 651 (1977) and; Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam) dealt specifically with the jurisdictional problems concerning review of double jeopardy issues.

The petitioner's case does not fit into the four exceptions to the final judgment requirement set out in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-87 (1975). First, the outcome of the remand proceeding in juvenile court is not pre-ordained. The petitioner may be found delinquent or acquitted; even if he is adjudicated a delinquent, the petitioner retains his right to a de novo trial in the jury session. Second, the state court proceedings may eliminate the federal issue. The juvenile hearing may acquit the

petitioner. Alternatively, a clear decision from the second tier judge would resolve whether the petitioner's first trial was defective due to insufficient evidence, denial of the right of confrontation, denial of cross-examination, error in admitting hearsay testimony, or simple confusion of purpose. The outcome of future state court proceedings will determine whether the federal issue survives. Third, the future state court proceedings will not necessarily moot the federal issue. In a companion case to the A Juvenile, Lydon v. Commonwealth, Mass. Adv. Sh. (1980) 1915, 1926, 409 N.E.2d 745, 752, the Massachusetts Supreme Judicial Court determined that a motion to dismiss for double jeopardy would properly be presented to the second tier trial court, and in Whitmarsh v. Commonwealth, 366 Mass.

212, 316 N.E.2d 610 (1974) the Court held that if the motion were denied, and the plaintiff convicted he would have an opportunity for appellate review of the ruling on his motion. Fourth, although the double jeopardy issue has been decided by the Supreme Judicial Court, reversal of the state court on the federal issue would not preclude further litigation. Even if this Court were to reverse the Massachusetts Supreme Judicial Court further proceedings would be required to determine the basis of the remand to the juvenile session. None of the four categories developed in Cox, supra, 420 U.S. at 479-83 fit the peculiar factual and procedural circumstances of the petitioner's situation.

In Harris v. Washington, 404 U.S. 55 (1971) (per curiam) the Supreme Court

reviewed a Washington Supreme Court decision which denied the defendant's motion to dismiss. While the language in Harris appears to apply to this case, the facts and procedural posture of the case are significantly different. The defendant in Harris had recently been acquitted of the same charge, stemming from the same conduct, with a different victim. This Court in a per curiam opinion applied the collateral estoppel principles of Ashe v. Swenson, 397 U.S. 436 (1970) and reversed the Washington decision. In contrast the petitioner's case involves the retrial of a single charge. In Harris the decision of the Supreme Court terminated the action. In the petitioner's situation, even if this Court finds for the petitioner on the merits, a new hearing will be required to determine the reason for the remand.

In Abney v. United States, 431 U.S. 651 (1977), a case involving a double jeopardy claim, this Court determined that although the federal district courts' pre-trial denial of a motion to dismiss was not a final order, the motion could be appealed as a collateral order. Abney, supra, 431 U.S. at 659; Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541 (1949). In Abney, however, there was a clear Federal District Court conviction, and a clear Appeals Court reversal on evidentiary grounds. The factual basis for consideration of the motion to dismiss was well presented. In contrast, the factual basis of the petitioner claim is unclear. First, the petitioner's claim of a trial de novo vacated his juvenile court sentence, there is no conviction on the record. Second,

the Superior Court judge denied plaintiff's motion to dismiss for double jeopardy and remanded the case to the first tier juvenile court without a specific finding. The Massachusetts Supreme Judicial Court considered the question reported by a single justice of the effect of a finding of insufficient evidence in a first tier juvenile proceeding,[5/] however, the single justice does not sit as a reviewing court; he does not adjudicate the rights of the parties, his conclusion is simply to frame the issue for the full bench. See Lydon v. Commonwealth, Mass. Adv. Sh. (1980) 1915, 1918 n.6, 409 N.E.2d 745, 748 n.6. The petitioner's record does not

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5/ See p. 9, supra, for the text of the question reported by the single justice.

provide the lower court conviction, or the clear basis for the denial of the motion to dismiss which formed the basis of the court's decision in Abney.

As well as being distinguishable on the facts, Abney is distinguishable on the law. In Abney the Supreme Court reviewed the decision of the Third Circuit Court of Appeals under 28 U.S.C. § 1291. Federal precedent under 28 U.S.C. § 1291 is not fungible with cases reviewing state judgments under 28 U.S.C. § 1257. Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction § 6004 (1971). Supreme Court review under 28 U.S.C. § 1257 involves considerations of federalism and comity between the state and federal judiciary not present when this Court reviews federal decisions.

Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam) presents the closest factual precedent to the petitioner's situation. In Costarelli, this Court held that it did not have jurisdiction under 28 U.S.C. § 1257 to review the defendant's double jeopardy claim since there had not been a decision from the Massachusetts Supreme Judicial Court. This Court relied on the decision of the Massachusetts court in Whitmarsh v. Commonwealth, 366 Mass. 212, 316 N.E.2d 610 (1974). Where the Supreme Judicial Court indicated that the defendant could raise the double jeopardy issue on appeal through the Massachusetts courts.

In this case, the petitioner received a review of his claim from the Supreme Judicial Court of Massachusetts. The

Massachusetts court considered and rejected the petitioner's claim under its statutory supervisory authority over the inferior courts of Massachusetts. M.G.L. c. 211, § 3.[6/] The ability of the Supreme Judicial Court to review the petitioner's claim, does not necessarily indicate that this Court is authorized to review the decision. M.G.L. c. 211, § 3 is a very broad grant of authority to review the practices of the inferior courts of Massachusetts. In contrast 28 U.S.C. § 1257 is a limited grant of authority to review the final decisions of state courts; the review authority provided by the two statutes is not coextensive. The

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6/ See Appendix at A-3 for text of M.G.L. c. 211, § 3.

petitioner's case was reviewable by the Supreme Judicial Court but is not reviewable by this Court.

In Costarelli, this Court noted that "an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may otherwise be resolved." Costarelli, at 196. That purpose guided this court in Costarelli, and it should guide the result of this petition. The record supporting petitioner's claim does not include a sentence from the District Court or a final judgment from the Supreme Judicial Court. The record also does not indicate the reasons for the remand to the juvenile session. The underlying dispute in this

case may well be resolved by further state proceedings. The record in petitioner's case does not provide this Court jurisdiction under 28 U.S.C. § 1257.

II. THE CASE DOES NOT PRESENT A DOUBLE JEOPARDY ISSUE, AS THERE WAS NO APPELLATE DETERMINATION OF INSUFFICIENT EVIDENCE.

This Court in Burks v. United States, 437 U.S. 1 (1978) held that an appellate finding that a trial court conviction was based on insufficient evidence would act as an acquittal; double jeopardy would prevent a new trial after a determination that the prosecution had failed to present sufficient evidence at the first trial. The critical aspect of Burks is the appellate determination of insufficient evidence. Petitioner's case does not

present such an appellate determination. Petitioner's motion to dismiss was denied by the jury session of the juvenile court. The case was remanded to the West Roxbury District Court for another hearing. The basis for the remand is not clear from the record.[7/] The absence of a clear determination of insufficient evidence distinguishes petitioner's case from Burks.

The underlying policy of the double jeopardy clause is also not presented in this case. The policy of the double jeopardy clause is that,

> permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm government with a potential instrument of oppression.

7/ See note 2, supra, for the arguments presented at the hearing on the motion.

United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). See also, Green v. United States, 355 U.S. 184, 187-88 (1957). The Commonwealth of Massachusetts is not subjecting the defendant to a second trial. The petitioner appealed from his bench trial to the second tier jury session. The petitioner's voluntary action forced a de novo trial - not the power of the state.

III. THE RECORD IS NOT SUFFICIENT TO SUPPORT SUPREME COURT REVIEW

Assuming that this Court finds jurisdiction under the principles of Abney v. United States, 431 U.S. 651 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); and Harris v. Washington, 404 U.S. 55 (1971) (per curiam), review of this case would not be prudent. Approximately one

half of the states have some form of a two tier criminal trial system, with appeal from the first tier to a de novo trial at the second tier.[8/] A decision in this case will therefore have tremendous effect on the criminal trial system in the United States. The record in this case is insufficient to support a constitutional decision of such magnitude.

The record of the proceedings involving the petitioner does not clearly present the double jeopardy issue. Petitioner first argued the double jeopardy issue in a motion to dismiss. That motion was denied, and the case remanded without any specific finding. A single justice of the Supreme

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8/ See Petition for Writ of Certiorari at note 6.

Judicial Court acting under the court's general superintendence power, M.G.L. c. 211, § 3, reported a question to the full bench of the Supreme Judicial Court. While this slim record, with no specific finding of insufficiency by the trial court, coupled with a reported question from a single justice, is enough for review by the Supreme Judicial Court of Massachusetts, under its general superintendence authority - it would be unwise for the Supreme Court to build broad constitutional principles on such a weak foundation. This Court would be forced into the position of speculating on the rationale for the trial court's denial of the petitioner's motion. Speculation is simply not a prudent basis for Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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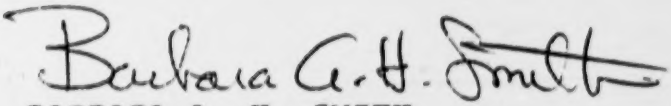

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APPENDIX A-1

Massachusetts General Laws c. 119, § 56, as amended through St. 1977, c. 431, § 2, provides in pertinent part:

> . . . a child adjudged a delinquent child may appeal to the superior court upon adjudication, and also may appeal to said court at the time of the order of commitment or sentence, and such child shall, at the time of such adjudication and also at the time of such order of commitment or sentence, be notified of his right to appeal. If such child appeals to the superior court at either of said times, said court shall thereupon have jurisdiction of such case, and such case shall forthwith be entered in said court. The appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases, except that the trial of said appeals in the superior court shall not be in conjunction with the other business of that court, but shall be held in a session set apart and devoted for the time being exclusively to the trial of juvenile cases. This shall be known as the juvenile session of the superior court, and shall have a separate trial list and docket. All appealed juvenile cases in the superior court shall be transferred to this list, and shall be tried, unless otherwise disposed of by direct order of that court. . . . Any child adjudged a delinquent in any district court in Suffolk County or in the Boston Juvenile Court, shall appeal to the Boston Juvenile Court and claim a jury of twelve in said court, if he so desires. Such claim shall be in writing. When a claim for a trial by a jury of twelve in the Boston Juvenile Court has been made under the provisions of said rules, the clerk of such district court in Suffolk County shall forthwith forward all papers in the case to the clerk of the Boston Juvenile Court. The justice presiding over a jury of twelve in said juvenile court shall have and exercise all the powers and duties which a jus-

> tice of the superior court has and may exercise in the trial and disposition of appeals under the first paragraph. . . . In the event of a trial by a jury of twelve in said juvenile court, review may be had directly by the Supreme Judicial Court by a bill of exceptions, appeal, report, or otherwise in the same manner as provided for trials by jury in the superior court. . . .

Massachusetts General Laws c. 119, § 55A, was added by St. 1978, c. 478, § 56, effective January 1, 1979. It provides:

> Trial of a child complained of as a delinquent child in a division of the district court department or of the juvenile court department shall be by a jury, unless the child files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury pursuant to section fifty-six. Such waiver shall not be received unless the child is represented by counsel or has filed, through his parent or guardian, a written waiver of counsel. Such trials by jury in the first instance shall be in jury sessions designated for their repective departments by the administrative justices of the district and juvenile courts for the hearing of appeals claimed pursuant to said section fifty-six. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

Massachusetts General Laws, c. 119, § 55A, was not applicable to the instant case insofar as the juvenile petitioner's arraignment occurred on November 28, 1978.

APPENDIX A-3

Massachusetts General Laws c. 211, § 3 provides:

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.